

Nos. 11485-11486

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of HERBERT
G. RELL, Bankrupt,

Appellee,

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of LOVINA
RELL, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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RELL, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

On March 6, 1946, Herbert G. Rell and Lovina Rell filed, respectively, their voluntary petitions in bankruptcy in the District Court of the United States, Southern District of California. On March 6, 1946 orders were made by said District Court, the Honorable William C. Mathis,

Judge Presiding, adjudicating the said Herbert G. Rell and Lovina Rell bankrupts (Bankruptcy Act, Section 4 (a) (11 USCA) Section 22 (a)), and referring proceedings to the Honorable Hugh L. Dickson, one of the Referees in bankruptcy of said court. George Gardner was duly appointed as Trustee of the Estate of each of said Bankrupts, qualified as such and since has been and is now the Trustee of said estates. The Appellant Citizens National Trust & Savings Bank of Los Angeles is a national banking association organized and existing under and by virtue of the laws of the United States of America. Said national banking association is listed as a secured creditor in the schedules of liabilities of said bankrupts filed in the proceedings. The amount of the indebtedness of the bankrupts to Appellant so listed and claimed was Twenty-Eight Hundred Ten (\$2810.00) Dollars and claimed to be secured by a chattel mortgage on one 1936 Plymouth Sedan, one 1935 Ford pick-up, truck, one 1936 Willys pick-up truck, one air compressor tank, and miscellaneous tools and equipment ordinarily used by a garage owner or machinist. The approximate value of said automobiles, air compressor tank, tools and equipment is \$5,000.00.

On or about April 15, 1946, the Trustee filed a petition for Order to Show Cause in said bankruptcy proceedings wherein he sought the issuance of an order requiring Appellant Bank to show cause, if any it had, why an order should not be made declaring the chattel mortgage to be void and of no effect as against the Trustee. Said petition was premised on the Trustee's allegations that no notice of intention to chattel mortgage the personal property referred to was ever published in a newspaper of general

circulation within the township within which said chattel mortgage was made, pursuant to the provisions of Section 3440 of the Civil Code of the State of California, and further that Appellant Bank had failed to file for record a copy of said chattel mortgage within a "reasonable time" following its "execution." By stipulation said petition was deemed to be amended to include an allegation of the Trustee to the effect that no certified copy of the chattel mortgage was "promptly deposited" with the Department of Motor Vehicles of the State of California at Sacramento, California.

The matter was finally submitted to the Honorable Hugh L. Dickson, Referee, on a written Stipulation of Facts. His Findings of Fact and Conclusions were made and on May 14, 1946, the Referee made his order pursuant to said Findings of Fact and Conclusions of Law that the trustee was the owner of and entitled to the possession of all of the items of personal property covered by said chattel mortgage, free and clear of any right, title, interest, estate, claim or lien of Appellant Bank; that said Trustee has a right to have and apply the value of the said personal property, free and clear of the purported lien of said chattel mortgage, to the payment of the obligations of the bankrupts' estates and for and on behalf of all the creditors of said bankrupts.

On or about May 18, 1946, Appellant as the mortgagee, filed its Petition for Review by the Judge of the order made by said Referee. On September 30, 1946, said petition was submitted to the Court, Honorable William C. Mathis, judge presiding, and on or about October 8, 1946, an order was made and entered by said Court affirming the order of the Referee made May 14, 1946, adjudging to be

void as against the trustee in bankruptcy said chattel mortgage.

On October 28, 1946, Notices of Appeal to the Circuit Court of Appeals for the Ninth Circuit was duly filed from said Order of the Court confirming Order of the Referee entered May 14, 1946, as aforesaid. (Bankruptcy Act, Section 24 (a) as amended by Act of May 27, 1946, Chap. 406, Section 9 (11 U. S. C. A., Section 47(a).)

Statement of the Case.

On March 6, 1946, Herbert G. Rell and Lovina Rell filed their voluntary petitions in bankruptcy in the District Court of the United States, Southern District of California, Central Division.

Both parties were adjudicated bankrupts on March 6, 1946, and orders were made referring the proceedings in both cases to the Honorable Hugh L. Dickson, one of the Referees in Bankruptcy of said Court.

The chattel mortgage, the validity of which is herein involved was executed by both the said Herbert G. Rell and Lovina Rell.

Herbert G. Rell, and Lovina Rell, on May 4, 1945, being prior to their bankruptcy, entered into an escrow to purchase a garage business and its equipment located in Los Angeles, California, from one Andrew H. Wilson. The parties to the escrow were said Andrew H. Wilson, as the vendor; Said Herbert G. Rell and Lovina Rell, as the purchasers; and the Appellant Citizens National Trust & Savings Bank of Los Angeles, as a lender of funds to Herbert G. Rell and Lovina Rell to enable them

to pay the full purchase price demanded by the Vendor. The Appellant Bank was to receive a chattel mortgage at close of escrow, executed by Herbert G. Rell and Lovina Rell, on the equipment to be sold [Tr. pp. 15 and 16], and, in addition, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1926 model, acquired or to be acquired by the Rells independent from the transaction for the purchase of the garage business, to secure the payment of its loan. [Tr. p. 21.] The chattel mortgage was made and executed by Herbert G. Rell and Lovina Rell under date of May 4, 1945, being the date of the opening of the escrow and deposited in said escrow on said day. The usual notice of intended sale by the Vendor, Andrew H. Wilson, was recorded and published pursuant to the provisions of Section 3440 of the Civil Code of the State of California. However, no publication of a Notice of Intention of Herbert G. Rell and Lovina Rell to chattel mortgage the property they intended to purchase from Andrew H. Wilson, and/or the two automobiles they had acquired or were acquiring independently of their intended purchase of the garage business, was ever published in a newspaper of general circulation within the township within which the said chattel mortgage was made, or, as provided in said Section 3440 of the Civil Code of the State of California, in the case of an intended mortgage of the fixtures or store equipment of a garage owner.

The escrow was closed on May 19, 1945. [Tr. p. 16.] On said date, the escrow depository disbursed the funds to the vendor, Andrew H. Wilson; delivered the bill of sale to the garage business and equipment to Herbert G. Rell and Lovina Rell; and delivered the chattel mortgage to the Appellant Bank. [Tr. p. 16.]

The Trustee in Bankruptcy, in a petition filed and presented for hearing before the Referee sought to have the chattel mortgage declared void on the grounds (a) The failure on the part of the mortgagor or the mortgagee named in the chattel mortgage to publish a notice of intention to chattel mortgage the equipment purchased by the bankrupt from Andrew H. Wilson, in compliance with the provisions of Section 3440 of the Civil Code of the State of California; (b) The failure of Appellant to record a copy of said chattel mortgage within a reasonable time following its execution, in the Office of the County Recorder of Los Angeles County, California; (c) No certified copy of the chattel mortgage was promptly deposited with the Department of Motor Vehicles of the State of California at Sacramento.

The matter was submitted to the Referee on a written stipulation of facts. The Referee made his order May 14, 1946, pursuant to his Findings of Fact and Conclusions of Law declaring said chattel mortgage void as against the Trustee in Bankruptcy and that the Trustee is the owner of and entitled to the possession of all items of personal property described in the mortgage, free and clear of any right, title, interest, estate, claim, or lien on the part of Appellant Bank. The matter was reviewed on Petition for Review by the District Judge, Honorable William C. Mathis, and on or about October 8, 1946, an order was made by said District Judge and entered, affirming the order of the Referee adjudging to be void as against the Trustee in Bankruptcy the said chattel mortgage.

It is the contention of Appellant that the provisions of Section 3440 of the Civil Code of the State of California

are not applicable to the chattel mortgage here involved; that the evidence, presented entirely by a written stipulation of facts, was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy, either on the ground of the failure of appellant to act promptly or diligently in causing the chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County, and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles at Sacramento, or on any ground.

The Stipulation of Facts omitted any mention as to when the chattel mortgage was recorded. However, the Court found, and it is admitted as true, that it was recorded in the Office of the County Recorder of Los Angeles County, California, on May 24, 1945, which was within a period of five days from close of escrow, and within a period of five days from the delivery of said chattel mortgage to Appellant at close of escrow.

The ownership certificates to the three automobiles included in the chattel mortgage, and which are required to accompany a certified copy of the chattel mortgage when deposited in the Department of Motor Vehicles in Sacramento (Sec. 195 Vehicle Code), were not delivered to Appellant Bank at close of escrow and were not, in fact, delivered to Appellant until the 3rd or 4th of June, 1945. The reason for this was that all of the ownership certificates were in the Motor Vehicle Department in Sacra-

mento at the time the escrow closed. They had been in the Motor Vehicle Department to effect transfers of ownership in the following particulars:

(a) The ownership of the Ford Pick-up truck sold by Andrew H. Wilson to Herbert G. Rell and Lovina Rell through said escrow was being transferred from a third party to the vendor, Andrew H. Wilson.

(b) The ownership of the Willys Pick-up truck, which was not purchased from said Andrew H. Wilson, was being transferred to Herbert G. Rell and Lovina Rell, the bankrupts, from a third party.

(c) The ownership of the Plymouth Sedan, which was also not purchased from Andrew H. Wilson, was being transferred to the bankrupts by Bank of America, pursuant to the discharge of a chattel mortgage held by said bank. [Tr. pp 18, 19 and 21.]

When Appellant discovered, at close of escrow that it could not then get delivery of the ownership certificates to the respective motor vehicles, it requested the bankrupts to sign, and they did so sign, a form of trust receipt setting forth, in effect, that they acknowledged holding in trust for Appellant documents or instruments evidencing the ownership of the automobiles, and undertook therein to deliver the ownership certificates in proper form to Appellant when they received them from the Department of Motor Vehicles. [Tr. pp. 18 and 19.]

A certified copy of the chattel mortgage was sent by Appellant, accompanied by the ownership certificates duly

endorsed, registration cards and fee, to the Department of Motor Vehicles in Sacramento for recordation on June 8, 1945, or a period of four days, or five days at most, from the time of the receipt by Appellant of said ownership certificates. [Tr. p. 19.] The details of the chattel mortgage loan were attended to by a department of Appellant Bank for that purpose, which consisted of a central office for handling hundreds of automobile loans secured by chattel mortgages for some thirty-four branches of the Bank. [Tr. p. 19.]

The ownership certificate on the Ford Pick-up truck, was sent with a certified copy of chattel mortgage to said Department of Motor Vehicles, also for the further purpose of having the *ownership* on this motor vehicle transferred from Andrew H. Wilson, the vendor, to the bankrupts. It is the Appellant's contention that the question of the applicability of Section 3440 of the Civil Code of the State of California could, in no event, involve the two automobiles acquired by the bankrupts independently of their purchase of the garage business from Andrew H. Wilson, as these two motor vehicles were not a part of the equipment of the garage business sold to and mortgaged by the vendees. It is also Appellant's contention that the charge made by the Trustee, and sustained by the Court, that Appellant failed to act promptly or diligently in causing the chattel mortgage to be recorded with the Motor Vehicle Department in Sacramento could only concern the validity of the mortgage on the automobiles, and not the remainder of the property included in the mortgage.

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(a) The ownership of the Ford Pick-up truck sold by Andrew H. Wilson to Herbert G. Rell and Lovina Rell through said escrow was being transferred from a third party to the vendor, Andrew H. Wilson.

(b) The ownership of the Willys Pick-up truck, which was not purchased from said Andrew H. Wilson, was being transferred to Herbert G. Rell and Lovina Rell, the bankrupts, from a third party.

(c) The ownership of the Plymouth Sedan, which was also not purchased from Andrew H. Wilson, was being transferred to the bankrupts by Bank of America, pursuant to the discharge of a chattel mortgage held by said bank. [Tr. pp 18, 19 and 21.]

When Appellant discovered, at close of escrow that it could not then get delivery of the ownership certificates to the respective motor vehicles, it requested the bankrupts to sign, and they did so sign, a form of trust receipt setting forth, in effect, that they acknowledged holding in trust for Appellant documents or instruments evidencing the ownership of the automobiles, and undertook therein to deliver the ownership certificates in proper form to Appellant when they received them from the Department of Motor Vehicles. [Tr. pp. 18 and 19.]

A certified copy of the chattel mortgage was sent by Appellant, accompanied by the ownership certificates duly

endorsed, registration cards and fee, to the Department of Motor Vehicles in Sacramento for recordation on June 8, 1945, or a period of four days, or five days at most, from the time of the receipt by Appellant of said ownership certificates. [Tr. p. 19.] The details of the chattel mortgage loan were attended to by a department of Appellant Bank for that purpose, which consisted of a central office for handling hundreds of automobile loans secured by chattel mortgages for some thirty-four branches of the Bank. [Tr. p. 19.]

The ownership certificate on the Ford Pick-up truck, was sent with a certified copy of chattel mortgage to said Department of Motor Vehicles, also for the further purpose of having the *ownership* on this motor vehicle transferred from Andrew H. Wilson, the vendor, to the bankrupts. It is the Appellant's contention that the question of the applicability of Section 3440 of the Civil Code of the State of California could, in no event, involve the two automobiles acquired by the bankrupts independently of their purchase of the garage business from Andrew H. Wilson, as these two motor vehicles were not a part of the equipment of the garage business sold to and mortgaged by the vendees. It is also Appellant's contention that the charge made by the Trustee, and sustained by the Court, that Appellant failed to act promptly or diligently in causing the chattel mortgage to be recorded with the Motor Vehicle Department in Sacramento could only concern the validity of the mortgage on the automobiles, and not the remainder of the property included in the mortgage.

The pertinent provisions of Section 3440 of the Civil Code of the State of California involved in this appeal are as follows:

“ . . . sale, transfer, assignment, or mortgage of the fixtures or store equipment of a . . . garage owner . . . will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor, or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee, shall record in the office of the County Recorder in the county or counties in which the said . . . fixtures or equipment are situated, a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendee, transferee, assignee, or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid; and shall publish a copy of such notice in a newspaper of general circulation published in the township in which said transfer or assignment is intended to be made, if there be one, and if there be none in such township, then in such newspaper in the county embracing such township, at least once, which publication shall be completed at least not less than two days before the completion of such sale, transfer, assignment or mortgage. . . .”

The pertinent provisions of Section 195 of the Vehicle Code of the State of California involved in this appeal are as follows:

“No chattel mortgage on any vehicle registered hereunder, irrespective of whether such registration was effected prior or subsequent to the execution of said mortgage, is valid as to creditors of the mortgagor, subsequent purchasers, or encumbrancers, until the mortgagor or his successor or assignee has deposited with the Department at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage, if said vehicle is then registered hereunder, or, if said vehicle is not so registered, by an application in the usual form for a registration, together with an application for registration as legal owner, and upon payment of the fees as provided in this Code.”

The pertinent provisions of Section 2957 of the Civil Code of the State of California involved in this appeal are as follows:

“The mortgage of personal property . . . is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value unless: . . .
(4) The mortgage, if of personal property other than crops growing or to be grown, or animated personal property, is recorded in the office of the Recorder of the County where the mortgagor resides

at the time the mortgage is executed, and also in the County where the property mortgaged is located, at the time the mortgage is executed, and to which such property is thereafter removed.”

Specifications of Error.

Appellant specifies that the following errors were committed by the trial court:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.

2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the Willys Pick-up truck and the Plymouth Sedan included in the chattel mortgage, which were not purchased by the bankrupts from Andrew H. Wilson and, therefore, were not at any time a part of the equipment of the garage business purchased.

3. The evidence, presented entirely by a written stipulation of facts, is insufficient to support the order of the Court adjudging the chattel mortgage void as against the Trustee in bankruptcy on the ground of failure of Appellant to act promptly and diligently in causing said chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles at Sacramento California. The evidence failed entirely to show any such failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded and causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California. [Tr. pp. 17 to 22.]

ARGUMENT.

I.

The Trial Court Erred in Determining That the Provisions of Section 3440 of the Civil Code of the State of California Were Applicable to the Chattel Mortgage.

The purpose of 3440 of the Civil Code is to prevent the defrauding of creditors by disposition of a debtor's assets. 12 Cal. Jur. 955, Sec. 3. In the instant case the debtors were *acquiring* assets. With the exception of the two automobiles included in the mortgage, ownership of which the bankrupts were acquiring from other parties, the debtors at no time owned or possessed a greater estate in the equipment of the garage business they had purchased from Andrew H. Wilson than *an ownership subject to the chattel mortgage involved in this case*. The bankrupts had no title to said garage business and equipment, with the incidents of ownership, namely, possession and enjoyment, prior to close of escrow. At close of escrow the ownership of said equipment passed to the bankrupts *subject to the chattel mortgage*. It follows, therefore, that creditors of the bankrupts could not possibly have been defrauded by the giving of the chattel mortgage, or indeed, in any way affected.

Section 3440 Civil Code provides for the publishing and recording of a seven-day notice of intention to mortgage the store equipment of a "garage owner." The bankrupts were not "garage owners" at any time before an effective chattel mortgage was given. *The Vendor Andrew H. Wilson* was the garage owner and owner of the mortgaged equipment during all the period preceding the giving of the mortgage at close of escrow, and there

was no period preceding its effective date wherein the bankrupts could qualify as "garage owners" to conform to a notice of intention to mortgage as provided in Section 3440 Civil Code.

In the case of *J. G. Beckjord v. Wm. I. Traeger, as Sheriff, etc.*, 3 Cal. App. (2d) 385, the mortgagor of the equipment or fixtures of a market had acquired a lease on the premises at the same time the mortgage was given. It was held that Section 3440 Civil Code was not applicable to the chattel mortgage as the mortgagor had not carried on the business of the market and it was not, as to him, a going concern until *after* the mortgage was given. A petition to have this case heard in the Supreme Court was denied. In the instant case the garage purchased by the bankrupts was not a going concern as to them until *after* an effective chattel mortgage was given.

In the case of *Rosum Utilities*, 25 Fed. Supp. 626 (1938), affirmed C. C. A., 105 Fed. Rep. (2d) 132, a like situation arose as in the case here. In that case the question involved was the applicability of the New York Bulk Sales Statute (230A Lien Law), similar to 3440 of the Civil Code of California, to a purchase-money chattel mortgage. The Court stated: "The mortgagor did not effect the creditors' rights by the execution of a purchase-money mortgage, as they had no interest in the chattels which were being purchased by the mortgagor. The creditors of the mortgagor could not possibly have been defrauded or deceived." The Circuit Court of Appeals, in affirming the decision, stated "No fraud on creditors is effected where a merchant adds to his stock by taking his goods subject to a purchase-money mortgage."

II.

The Court Erred in Determining That the Provisions of Section 3440 of the Civil Code of the State of California Were Applicable to the Two Automobiles, To Wit, a Willys Pick-up Truck, 1936 Model, and a Plymouth Sedan, 1936 Model, Included in Said Chattel Mortgage, the Ownership of Which Were Acquired by Herbert G. Rell and Lovina Rell From Other Parties, and Which Were at No Time Part of the Garage Business and Equipment Purchased From Andrew H. Wilson.

Included in the chattel mortgage were two automobiles, namely, a Willys Pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, the ownership of which the bankrupts were acquiring from parties other than Andrew H. Wilson, the vendor of the garage business. [Tr. p. 21.] These motor vehicles were not, therefore, a part of the garage equipment purchased by the bankrupts. They were not, therefore, at any time prior to the delivery of the mortgage at close of escrow a part of the fixtures or store equipment of a garage owner. The applicable provisions of 3440 Civil Code have reference only to the sale, transfer, assignment or mortgage of the "fixture or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant." It is therefore respectfully submitted that as these two motor vehicles, included in the chattel mortgage, were none of these things as mentioned in said Code Section, the provisions of said Sections were not applicable.

III.

The Evidence, Presented Entirely by a Written Stipulation of Facts, Was Insufficient to Support the Order of the Court Adjudging the Chattel Mortgage Void as Against the Trustee in Bankruptcy on the Ground of Failure of Appellant to Act Promptly or Diligently in Causing Said Chattel Mortgage to Be Recorded in the Office of the County Recorder of Los Angeles County.

It is respectfully submitted that the point raised by the trustee in bankruptcy to the effect that the appellant bank failed to act promptly or diligently in causing the chattel mortgage to be recorded in the Office of the County Recorder is more conjured up than real. This is apparent from his petition for order to show cause filed with and presented to the Referee. [Tr. pp. 11 to 14, incl.] In Paragraph VIII of said petition [Tr. p. 13] the trustee uses the language “. . . and by virtue of the failure of said respondent to file for record a copy of said Chattel Mortgage within a reasonable time following its *execution*, the said Chattel Mortgage is void and of no effect as against your Petitioner.”

It is submitted that the date of the *execution* of the chattel mortgage is not the date to be measured in relation to the time of its recording with the County Recorder. Obviously, the mortgage could not be recorded prior to its delivery to the mortgagee at close of escrow. The mortgage did not become an effective chattel mortgage until that time. The escrow closed May 19, 1945, and

the mortgage was recorded in the Office of the County Recorder in Los Angeles County on May 24, 1945. This was within a period of *five* days.

A thorough search has been made of the cases relating to the question of diligent recording of chattel mortgages. No case has been found, and it is believed none will be found, holding that a brief period of *five* days constitutes unreasonable delay in recording a chattel mortgage from the time the mortgage was given or became an effective chattel mortgage.

Especially, as in the instant case, where the mortgagee is a large lending institution handling hundreds of chattel mortgage loans, through a central office for some thirty-four branch banks [Tr. p. 19] does it appear that five days is an unreasonable length of time in which to cause a chattel mortgage to be recorded. If this period of five days from the time of the delivery of the mortgage to the time of its recording constitutes unreasonable delay, the validity of the mortgage would only be affected as to those creditors of the mortgagor who became creditors during the interval between the time of delivery at close of escrow and the time of recordation, and it would not be entirely void, or void as to all creditors of the mortgagors.

Schwartzler v. Lemas, 11 Cal App. (2d) 442;

Wolpert v. Gripton, 213 Cal. 474.

IV.

The Evidence Was Insufficient to Support the Order of the Court Adjudging the Chattel Mortgage Void as Against the Trustee in Bankruptcy on the Ground of Failure of Appellant to Act Promptly or Diligently in Causing a Certified Copy or Certified Copies of Said Chattel Mortgage to Be Deposited With the Department of Motor Vehicles in Sacramento, California.

It is submitted that the point raised by the Trustee to the effect that the Appellant Bank failed to act promptly or diligently in causing a certified copy of its chattel mortgage to be deposited with the Department of Motor Vehicles in Sacramento is also more or less conjured up than real. The ownership certificates must accompany the certified copy of the chattel mortgage when deposited with the Department of Motor Vehicles in Sacramento for registration. (Sec. 195 Vehicle Code of the State of California.)

At the time the escrow closed ownership of the three automobiles was not registered in the Bankrupts. No effective registration of the chattel mortgage could be made until ownership of the vehicles was duly registered in the Bankrupts and ownership certificates issued accordingly.

When the escrow closed no ownership certificates on the automobiles were available for delivery to the mortgagee bank. At that time, and for some time prior thereto, ownership of these cars was in the process of being transferred in the Department of Motor Vehicles in Sacramento. The Ford Pick-up truck was being transferred from some third person to the vendor Wilson.

The ownership to the remaining two cars was being transferred from other persons to the Bankrupts. It was not until the 3rd or 4th of June, 1945 when the ownership certificates were delivered to the mortgagee bank. [Tr. p. 19.]

On June 8, 1945, being within a period of five days from the time of the delivery of the ownership certificates to the Appellant a certified copy of the chattel mortgage accompanied by the ownership certificates was forwarded for deposit with the Department of Motor Vehicles in Sacramento. No cases have been found, and it is believed none will be found, wherein a period of five days is held to be an unreasonable delay in causing a certified copy of a chattel mortgage on an automobile to be deposited with the Department of Motor Vehicles at Sacramento.

It can be said that in respect to the Ford Pick-up truck there was no measurable period of delay in depositing the chattel mortgage in Sacramento with the Department of Motor Vehicles. The ownership of this vehicle had been just recently transferred from another party to Andrew H. Wilson and the certificate of ownership delivered to the bank on this motor vehicle showed it as issued in the name of Andrew H. Wilson as owner and bearing the endorsement of Andrew H. Wilson for transfer to the bankrupts. This ownership certificate was sent to the Department of Motor Vehicles with a certified copy of the chattel mortgage to accomplish two things; firstly, to transfer the ownership thereof from Wilson to the bankrupts, and secondly, to register the chattel mortgage given thereon by the bankrupts. Thus, a certified copy of the chattel mortgage was on deposit with the Depart-

ment of Motor Vehicles, at the moment when transfer of ownership of this vehicle was made to the mortgagors.

It is submitted that if there is indeed any merit to the Trustee's charge of undue delay by Appellant in causing the certified copy of the chattel mortgage to be deposited with the Department of Motor Vehicles, it would only affect the validity of the chattel mortgage as to the three automobiles and as to the creditors of the mortgagors who became creditors during the time when a certified copy of an effective chattel mortgage could be deposited with the Department and the time when the same was in fact so deposited.

Schwartzler v. Lemas, 11 Cal. App. (2d) 442;

Wolpert v. Gripton, 213 Cal. 474.

Conclusion.

The order of the Court upon which this appeal is taken renders the chattel mortgage involved herein entirely void and of no effect as if it had never been given in the first instance. As this mortgage was in the nature of a purchase-money mortgage, in that the proceeds of the mortgage loan were all applied toward the purchase and acquisition of the property by the mortgagors, the result of the order cancelling out entirely the mortgage lien on the property is to hand over to the Trustee in bankruptcy for the benefit of all the mortgagors' creditors, and to the detriment of the mortgagee without whose loan the property would not have been purchased by the mortgagors, an estate greater than the mortgagors ever owned or possessed.

It is submitted that not only does the language of Section 3440 of the Civil Code exclude this mortgage from

its application, because the mortgagor was not a “garage owner” until after an effective chattel mortgage was given, but it was never intended in the enactment of this Code provision that chattel mortgages of this nature should be subject to its provisions in that no possible prejudice could result to the creditors of the mortgagors.

In so far as the charge is made by the Trustee that there was undue delay or lack of diligence in causing the chattel mortgage to be recorded with the County Recorder and deposited with the Department of Motor Vehicles, it is submitted that the facts speak for themselves and that no further comment is necessary in this conclusion to support Appellant’s contention that said charge is without merit.

Appellant, therefore, respectfully submits that the order heretofore entered, adjudging the chattel mortgage to be void as against the Trustee in Bankruptcy, be reversed.

Respectfully submitted,

HENRY MERTON,

Attorney for Appellant.

